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**IN THE HIGH COURT OF NEW ZEALAND**
**WHANGAREI REGISTRY**

**CIV-2008-488-653**

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| BETWEEN | BENTZEN FARM LIMITED<br>Plaintiff |
| AND | GEOFF BAYLEY<br>First Defendant |
| AND | DONOVAN DRAINAGE &<br>EARTHMOVING LIMITED<br>Second Defendant |

Hearing: 22 September 2008
(Heard at Auckland)

Appearances: A Barker for Plaintiff
S Robertson and M Haggie for Second Defendant

Judgment: 22 September 2008

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**JUDGMENT OF JOHN HANSEN J**

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A Barker, Barrister, PO Box 4338, Shortland Street, Auckland

[1] The plaintiff was involved in a substantial subdivision in Waipiro Bay in the Bay of Islands. The head contractor for the works on this subdivision was the second defendant. A dispute arose between them and pursuant to the Construction Contracts Act 2002 the matter was referred to the first defendant. The initial claim made by the second defendant, I understand, was approximately $1.6 million. The adjudicator determined a sum of just over $1 million.

[2] The plaintiff commenced judicial review proceedings. On 18 September 2008 an ex parte application for interim relief was filed in this Court. Somewhat unwisely, in hindsight, I dealt with the matter very quickly before I went into the Duty Judge List. In hindsight it would have been better to have the matter dealt with on notice, but in any event the application to set aside the interim relief granted has been accommodated within a very short time.

[3] There has been considerable argument today as to the effect and meaning of the Construction Contracts Act 2002. It is argued on behalf of the second defendant that s 60 on its face precludes interim relief even though judicial review proceedings have been commenced. Such an interpretation of the section has been supported on a number of grounds by Mr Robertson, and he spent some time in disagreeing with the decision of Courtney J in *Concrete Structures (NZ) Ltd v Palmer* [2006] NZAR 513. There Courtney J in a considered reserved judgment determined that it could not have been the intention of Parliament to remove all interim rights granted by s 8 of the Judicature Amendment Act 1972.

[4] In support of this argument Mr Robertson referred me to the decision of Randerson J: *Volcanic Investments Limited v Dempsey & Wood Civil Contractors Limited* 18 PRNZ 97 at [26], and also the decision of the Court of Appeal: *George Developments Limited v Canam Construction Limited* [2006] 1 NZLR 177. He also prayed in aid the Hansard Debate dealing with the later section in the Act. Mr Barker contends that Courtney J's decision was right and it cannot be that Parliament intended to remove all rights of interim relief, e.g. where it was clear on its face an adjudication under the Construction Contracts Act was clearly wrong.

[5] This is a matter of urgency for the parties and for that reason I consider it not appropriate to reserve a decision and consider these interesting arguments at some leisure. They are interesting arguments and there is strength in them both, although my initial reaction is to favour the analysis put forward by Mr Robertson. It is in my view correct. I propose, however, to deal with the matter on another basis.

[6] It is clear from *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423 (CA) that there is a threshold test for interim relief under s 8. The first of **those** is whether it is **necessary** to grant an interim order and then whether, given the circumstances including the statutory framework, the Court should grant an interim order. I am satisfied considering it in that limited way, not to side-step Mr Robertson's argument but simply to approach the matter pragmatically, that on the evidence in front of me today I am not satisfied that it is **necessary** to grant any interim relief.

[7] It is common ground that the need for relief was said to be financial uncertainty surrounding the second defendant, and whether it would be in a position to refund the money in due course if this judicial review proceeding was successful. To do that it is necessary to turn to the evidence.

[8] The evidence in support of the application is sworn by a Ms Pyle who is a financial controller of a group of companies, which includes Bentzen Farm Limited. At paragraph 3 she sets out a number of grounds, which she maintains causes concerns of such a level about the financial situation of the second defendant that relief should be granted. Now that an application has been filed to set the matter aside the Court has the benefit of an affidavit of Mr Donovan who is the managing director of the second defendant, where he deals with each of the points raised by Ms Pyle in her affidavit. Mr Barker has criticised that information, saying that no accounts have been produced, that there is a lack of detail, that there is a lack of how some of the moneys mentioned by Mr Donovan have been treated by the appellants.

[9] The starting point, of course, is as stated by Courtney J at [28] in *Concrete Structures (NZ) Ltd v Palmer*. It is for the plaintiff to show the necessity for interim relief to preserve its position. As she said, it needs to show a real risk that if it pays

over the outstanding sum the second defendant would be unable to repay the plaintiff if successful.

[10] I turn to Ms Pyle's evidence. She makes a number of statements, all of it hearsay, and in relation to two matters without even identifying the source of the information. What I will do is deal with each in turn and Mr Donovan's response. The first relates to a judgment against Donovans by Halls Earthworks Limited (in liquidation). There is also an amount of costs. Ms Pyle says, from inquiries from an unnamed source, the amount has not been paid. Mr Donovan's response is that while payment has not yet been made, the total sum owed is lodged in his solicitor's trust account pending a further hearing.

[11] The second is an amount said to be owing under an arbitration with a company called Blitzen. Again Ms Pyle completely fails to identify the source of the information. Mr Donovan confirms there was an arbitration with Blitzen, and that they were successful in the claim for retention of funds that had not been paid. He points out that the arbitration decision is confidential so he is unsure of how Ms Pyle obtained the information, but he says the principal of Blitzen is currently in a position of attempting to secure funds and they expect payment shortly.

[12] The third matter relates to an allegation by Ms Pyle of a sum owing to Earl Metal Suppliers Limited from June and July of this year. The response is that Mr Donovan is unaware of any such company but does know of a company, EJ Reed & Co Limited. He says that Donovans has queried discrepancies on metal quantities charged. He is awaiting a response and there has been no request for payment of the invoices.

[13] Thirdly is a claim from OUE Concrete, which is said to be approximately $120,000.00. Again I note in relation to both Earl Metal Suppliers Limited and OUE Concrete, they both appear to be corporate entities and Ms Pyle fails to identify who at those companies she spoke to. In any event Mr Donovan explains the situation, that there are a number of inconsistencies in invoices, that there have been a number of meetings and as far as he is concerned no money is owed. Donovans have

responded with a schedule setting out what is paid and the reasons for the differences and goes on to say that they have not heard from OUE Concrete for several months.

[14] The next issue relates to Fletcher Steel. On this occasion, although no person is identified, there is an exhibit to the affidavit of Ms Pyle. It records under the Personal Property Securities Act 1999 a registered general security over all present and after-acquired personal property. It was explained by Mr Donovan as a standard requirement when one wants to purchase on credit from a company such as Fletcher Steel. He says that most suppliers have forms of that sort and it is common practice. No real dispute has been taken about that, although it is said that money may be outstanding and, as I understand it, accounts should have been produced. The only amount owing is said by Mr Donovan to be $5,000.00.

[15] Finally, it is said that during the construction of this work the architect complained about the amount of materials needed that were not stockpiled on site. This apparently led the architect to consider that he was concerned about Donovan's financial position. Mr Donovan's response is that over time the job changed significantly and it was continual changes of designs that led to any shortages of materials, but stockpiles were made where possible. He also states there were no late payments to sub-contractors unless there were issues about workmanship, and no issues are taken with that.

[16] Perhaps of more significance is that the plaintiff through Ms Pyle is completely unable to point to any statutory demands or any such other items that usually gives some hint or indication objectively of insolvency. All of the matters raised by Ms Pyle, hearsay and unattributed, have in my view been properly and responsibly dealt with by Mr Donovan who also has signed a certificate of insolvency.

[17] On the basis of the evidence that is now before me that was not complete last week, I have not been satisfied of any necessity to grant the interim relief sought. It follows that the order made last week is set aside.

[18] There will be costs to the second defendant in this matter on a 2B basis. There will be a certificate for today's hearing for a second counsel. There will also be included in the disbursements reasonable travel and accommodation allowance for two counsel.

[19] I make the following timetabling orders:

a) The plaintiff is to file and serve its statement of claim within seven (7) days.

b) The defendants are to file and serve a statement of defence within seven (7) days thereafter.

c) It is agreed that there should be evidence by affidavits with cross-examination on the affidavits.

d) Any further affidavits by the plaintiff are to be filed and served seven 14 days thereafter.

e) Any further affidavits by the second defendant are to be filed and served seven 14 days thereafter.

f) Any affidavits in reply to be filed and served 14 days thereafter.

g) It is agreed that any relevant documents will be exhibited to the affidavits. It is also agreed that notice will formally be made to the Court if anyone seeks to cross-examine on the affidavits.

h) The matter is set down for a one-day fixture on Wednesday, 5 November 2008.

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**John Hansen J**